No. 89-914

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL POSTERS, INC. AND NATIONAL LITHO, A DIVISION OF NATIONAL POSTERS, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board acted within its discretion in ordering petitioners to bargain with the certified representative of their employees notwithstanding the passage of time and the employee turnover that occurred while petitioners were litigating their obligation to bargain.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 885 F.2d 175. The second supplemental decision and order of the National Labor Relations Board (Pet. App. 113a-156a) is reported at 289 N.L.R.B. No. 58. The initial opinion of the court of appeals (Pet. App. 14a-30a), remanding the Board's initial decision and order (Pet. App. 50a-61a), is reported at 720 F.2d 1358. The Board's first supplemental decision and order after remand (Pet. App. 62a-112a) is reported at 282 N.L.R.B. 997.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1989. The petition for a writ of certiorari was filed on December 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 15, 1981, the Board conducted a representation election among petitioners' production and maintenance employees at their two Baltimore, Maryland locations. The tally of ballots showed 24 votes for the Baltimore Printing Pressmen and Assistants Union, Local 61 (the Union) and 21 votes against. Four ballots were challenged—a number sufficient to affect the result. The Union challenged three ballots, that of a plant clerical and those of Albert Amend and Wesley Souders who it claimed were supervisors. Petitioners challenged the ballot of Samuel John who they claimed was a casual or seasonal employee. Pet. App. 15a, 31a-32a.

On March 16, 1982, the Regional Director, without holding a hearing, ruled *inter alia* that the ballots of John and the plant clerical should be opened and counted.[1] Pet. App. 32a-35a, 35a-36a. The Regional Director also dismissed objections to the conduct of the election filed by both petitioners and the Union. Pet. App. 36a-47a.[2] The

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[1] The Regional Director determined that a hearing would be necessary to determine the challenges to the ballots of Amend and Souders. However, the Regional Director declined to order a hearing pending a determination if, under the revised tally, those votes would not be determinative. Pet. App. 35a, 48a.

[2] Petitioners contended that the Union misrepresented various benefits and obligations of union representation and falsely claimed that petitioners' president had made large gifts to his children. Pet. App. 36a-41a. The Regional Director found that the allegation concerning family gifts, even if true, did not amount to an allegation of "corporate misfeasance" (Pet. App. 38a); the remaining allegations were not supported, as required by the Board's procedures, by signed witness statements. Pet. App. 40a-41a. The Regional Director determined that one of the objections made by the Union—a claim that petitioners had improperly provided employees a free health plan in order to persuade them not to vote for the Union—raised issues of

Board upheld the Regional Director's rulings. The revised tally showed the Union ahead by 25 to 22 and, on July 14, 1982, the Union was certified as bargaining representative. Pet. App. 67a.

Thereafter petitioners refused to bargain with the Union, and the Union filed unfair labor practice charges. The Board, on December 10, 1982, found that petitioners had violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5) and (1), and ordered petitioners to bargain with the Union upon request. Pet. App. 50a, 55a, 57a-58a.

Petitioners then sought review of the Board's decision. The court of appeals, one judge dissenting, found that John's employment status raised material issues of fact about his eligibility to vote and remanded the case to the Board for an evidentiary hearing. *National Posters, Inc.* v. *NLRB,* 720 F.2d 1358 (4th Cir. 1983); Pet. App. 14a-27a. The court also held that petitioners "should be given the opportunity to amend [their] objections" to the election in light of the Board's new rule in *Midland National Life Insurance Co.,* 263 N.L.R.B. 127 (1982), limiting the circumstances under which elections would be set aside because of misrepresentations.[3] Pet. App. 25a-26a.

2. Pursuant to the remand, the Board directed that a hearing be held to determine John's eligibility to vote. Pet.

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fact that could only be determined after a hearing. Pet. App. 41a-42a. That hearing became unnecessary after the opening of two of the challenged ballots revealed the Union a winner in the election. Pet. App. 48a.

[3] In *Midland National Life Insurance Co.,* the Board held that it would no longer set aside elections based on misleading campaign statements, unless the "deceptive manner" in which the statements were made precluded the voters from evaluating them. 263 N.L.R.B. 127, 133 (1982). The Board also determined to apply its new rule retroactively. *Id.* at 133 n.24.

App. 68. On November 23, 1984, after the hearing, the administrative law judge issued a recommended decision finding that John had a reasonable expectation of continued employment on the date of the election and that he was eligible to vote. Pet. App. 94a-95a.[4] Accordingly, the ALJ recommended reissuance of the Board's original decision and order.[5] Pet. App. 111a.

On February 4, 1987, the Board issued a decision and order affirming the ALJ's findings regarding the eligibility of John, Amend, and Souders. Pet. App. 63a. However, the Board also granted petitioners' motion to reopen the record. The Union's parent, the International Printing and Graphic Communications Union (IPGCU), had merged during the pendency of the litigation with the Graphic Arts International Union (GAIU) to form the Graphic Communications International Union (GCIU). After the merger, the Union changed its name to the Baltimore Graphic Communications Union, Local No. 61-C, an affiliate of the GCIU. The Board determined that more information was necessary to decide whether the merger between the IPGCU and GAIU so substantially changed the Union as to have affected the Union's continued status as representative of a majority of petitioners' employees. Pet. App. 63a-64a. The Board rejected petitioners' contention that the high turnover rate among their employees since

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[4] The Board had also directed that evidence be taken to resolve the issue of the supervisory status of Amend and Souders, because if John's vote were disallowed, those two votes could be determinative. Pet. App. 68a. The ALJ found that Amend was a supervisor but that Souders was not. However, because Souders' vote would not be determinative given the ruling with respect to John, the ALJ declined to order the opening of Souders' ballot. Pet. App. 96a-111a.

[5] The ALJ also noted that petitioners had not pursued the opportunity afforded by the remand to have a hearing on their objections to the election. Pet. App. 68a n.3.

the election required the holding of a new election. Pet. App. 64a n.4.

3. The ALJ reopened the hearing on July 29, 1987. Pet. App. 122a. On February 11, 1988, the ALJ issued a recommended decision in which he concluded that the internationals' merger caused no substantial changes in the Union that could raise a question concerning representation. Pet. App. 156a. On June 30, 1988, the Board upheld the ALJ's recommended decision. Pet. App. 114a. The Board also denied petitioners' request to reopen the record to take evidence concerning the turnover that had occurred since its prior decision or to reconsider its prior ruling that the "turnover" argument lacked merit. Pet. App. 113a n.1. Accordingly, the Board found that petitioners violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and it reaffirmed its bargaining order. Pet. App. 114a-115a; see also *id.* at 56a-57a.

4. The court of appeals enforced the Board's order. Pet. App. 2a. It concluded that substantial evidence supported the Board's conclusion that John was eligible to vote. Pet. App. 7a. The court also agreed with the Board that the merger between the IPGCU and the GAIU did not raise a question concerning the Union's representative status. Pet. App. 8a-11a. Citing *NLRB* v. *Financial Institution Employees*, 475 U.S. 192, 207 (1986), the court noted that "[w]hile changes in the governing structure of a local union's national affiliate could alter the identity of the local, especially if the local's bargaining autonomy is consequently restricted, it is the substantial continuity of the local union rather than the affiliate that remains at issue." Pet. App. 10a. The court then concluded that the merger did not substantially affect the relationship between the Union and the unit employees. Pet. App. 9a-11a.

Finally, the court rejected petitioners' assertion that they were entitled to have the record reopened to present evidence concerning employee turnover since the election. Pet. App. 11a. The court acknowledged that "[c]ourts have, albeit rarely and in extreme cases, declined to enforce bargaining orders because of undue delay, attributable to the NLRB, in the resolution of election disputes." *Ibid.* But while it pointed out that "[n]o good reason" accounted for the two and a half year delay between the first hearings on John's eligibility and the Board's decision (Pet. App. 12a n.5), the court indicated that it was not appropriate to place "the entire blame for the eight year delay in the proceeding below on the NLRB." Pet. App. 12a. Rather, the court turned to an examination of the record, finding it "entirely devoid of evidence that new employees are dissatisfied with or otherwise opposed to Local 61-C's representation." Pet. App. 12a-13a. The court concluded that the "bare fact that employee turnover has occurred [within] the eight years since the election" provided no basis for doubting the Union's continuing majority status. Pet. App. 12a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Barring unusual circumstances, a union's majority status may not be questioned during the year following the union's certification. *Brooks* v. *NLRB,* 348 U.S. 96 (1954). The certification year has never started to run in this case, because that period does not begin until the employer commences bargaining with the union in good faith, and petitioners have not yet done so. *NLRB* v.

Action Automotive, Inc., 853 F.2d 433, 434 (6th Cir.), cert. denied, 109 S. Ct. 865 (1989); *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962). Petitioners essentially contend that the passage of time and the turnover that occurred while they were litigating their obligation to bargain constitute unusual circumstances precluding the issuance of a bargaining order.[6] There is no merit to that contention.

This Court has consistently held that a union's loss of majority status during delays due to litigation does not terminate an employer's obligation to bargain. Otherwise, as the Court explained in *Frank Bros.* v. *NLRB*, 321 U.S. 702, 705 (1944), "procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus pro-

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[6] Petitioners assert (Pet. 12, 17, 21) that the change in the Union's affiliation and unresolved allegations of Union misrepresentation during the election campaign are also factors which bear on the propriety of a bargaining order. However, the court of appeals found that the merger of the Union's parent international raised no question concerning the Union's continuing majority status (Pet. App. 10a-11a), and petitioners have not challenged that finding in their questions presented for review (Pet. (i)). See Sup. Ct. R. 14.1(a). Nor did petitioners pursue the opportunity afforded by the court of appeals, in its initial decision remanding this case to the Board, to pursue their allegations concerning Union misrepresentations. See pp. 3-4 & note 5, *supra*; Pet. App. 68a n.3. In addition, petitioners have not raised in their questions presented any contention concerning retroactive application of the Board's rule in *Midland National Life Insurance Co.*, *supra*, that misrepresentations no longer warrant the setting aside of an election unless deception in the manner they are made precludes their evaluation by voters. (In any event, the courts of appeals have uniformly approved retroactive application of *Midland*. See, *e.g.*, *NLRB* v. *Best Products Co., Inc.*, 765 F.2d 903, 911 nn.8-9 (9th Cir. 1985).) Accordingly, as the court of appeals observed (Pet. App. 11a-12a), the only issue here is whether delay and "bare assertions of employee turnover" warrant further consideration of the propriety of the bargaining order.

viding employers a chance to profit from a stubborn refusal to abide by the law." See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 610-613 (1969); *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962); see also *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-38 (1987).

This case illustrates that concern. The Union won a representation election in 1981 and was certified as the bargaining representative of petitioners' employees in 1982. Since that time, petitioners have pressed a variety of objections to the Union's representative status, none of which has been found meritorious. While petitioners assert (Pet. 11-12) that the passage of time here was attributable to the Board's "inexcusable delays," the court of appeals correctly points out (Pet. App. 12a & n.5) that only the hiatus between the ALJ's and the Board's post-hearing decision on John's eligibility was attributable to unexplained delay by the Board.[7]

In any event, while noting that "[i]nordinate delay in any case is regrettable," this Court has rejected the contention that enforcement of a bargaining order should be denied or conditioned on the holding of a new election because of the Board's delay in issuing the order, even in the presence of the employees' subsequent repudiation of the union. *Katz*, 369 U.S. at 748 n.16. Here, as the court of appeals noted (Pet. App. 12a-13a), the record is "entirely

[7] Petitioners also contend (Pet. 11) that the Board unduly delayed the proceedings by failing to hold a hearing on their ballot challenges prior to certification. But as indicated by the fact that one judge dissented from the initial panel decision on the ground that no hearing was necessary (see Pet. App. 28a-30a), the Board's determination of the challenges without a hearing cannot be deemed egregious administrative action. Indeed, if anything, it represented an attempt to resolve election issues expeditiously.

devoid" of evidence that the new employees are dissatisfied with or oppose Local 61-C's representation.[8]

2. The courts of appeals have consistently rejected employers' claims of employee turnover as a justification for refusing to bargain with a Board-certified union during the certification year. See, *e.g.*, *Action Automotive*, 853 F.2d at 434-435; *NLRB* v. *Star Color Plate Service*, 843 F.2d 1507 (2d Cir.), cert. denied, 109 S. Ct. 81 (1988); *NLRB* v. *Best Products Co.*, 765 F.2d 903, 913-914 (9th Cir. 1985); *NLRB* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (8th Cir. 1969); cf. *NLRB* v. *Patent Trader, Inc.*, 426 F.2d 791 (2d Cir. 1970) (en banc).

The cases cited by petitioners (Pet. 13-18) are not to the contrary. A number of those cases involved a union that, unlike the Union here, had never been properly certified. Thus the court in *Mosey Mfg. Co.* v. *NLRB*, 701 F.2d 610 (7th Cir. 1983), invalidated the Board's certification of a union because of union misrepresentations under the standard then applied by the Board to evaluate such misrepresentations. The court refused to remand the case to the Board for examination under a subsequently adopted standard because five and a half years had elapsed since the election and the court was not sure that the Board intended the new standard, which had been adopted and re-

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[8] Petitioners complain (Pet. 18-20) that the court of appeals improperly relied on *NLRB* v. *Financial Institution Employees*, 475 U.S. 192 (1986), in concluding that their attack on the propriety of the bargaining order could not succeed unless the circumstances relied upon provided an objective basis for believing the Union had lost its majority status. However, this standard was, if anything, more accommodating than necessary to petitioners. In *Brooks* v. *NLRB*, 348 U.S. 96, 103 (1954), this Court made clear that loss of majority status was not an unusual circumstance affording grounds for refusing to recognize the bargaining agent during the certification year; as noted above, the certification year in this case has yet to run.

jected and readopted during the pendency of the litigation, should apply on the anomalous facts of the case. *Id.* at 611-613, 615. Similarly, in *NLRB* v. *Triplex Mfg. Co.*, 701 F.2d 703, 709 (7th Cir. 1983); *NLRB* v. *Nixon Gear, Inc.*, 649 F.2d 906, 914 (2d Cir. 1981); and *NLRB* v. *Connecticut Foundry Co.*, 688 F.2d 871, 881 (2d Cir. 1982), the courts declined to remand cases to the Board where certifications had been held invalid due to denial of hearings on election objections. The courts decided that passage of time had both decreased the ability to hold a fair hearing on the objections and called into question the union's continuing majority support. Unlike those cases, this case does not involve another time-consuming remand (see *Star Color*, 843 F.2d at 1509); the Board's order requires the petitioners to bargain with a union properly certified after an election which has been the subject of repeated hearings.[9]

Clark's Gamble Corp. v. *NLRB*, 422 F.2d 845 (6th Cir.), cert. denied, 400 U.S. 868 (1970); *NLRB* v. *American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir.), cert. denied, 400 U.S. 957 (1970); and *NLRB* v. *Ship Shape Maintenance Co., Inc.*, 474 F.2d 434 (D.C. Cir. 1972), did not involve post-election certifications. Rather, they involved bargaining orders issued pursuant to *Gissel Packing Co., supra*, in which the courts deemed employee turnover and passage of time relevant to the assessment of whether a bargaining order was still proper because a fair election could not be held given the employer's unfair

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[9] *NLRB* v. *St. Regis Paper Co.*, 674 F.2d 104, 107-108 (1st Cir. 1982), did not involve a certification of election results at all. The bargaining order was based on a finding that a new group of employees had been accreted to the certified unit. Furthermore, the remand to consider the continued appropriateness of the bargaining order was based on the fact that the facility in issue had closed down. *Id.* at 109.

labor practices. No case has held that the factors to be considered in that context affect the enforceability of a Board order to bargain with a union certified on the basis of an election—the preferred method of determining whether a union has majority support. *Gissel Packing Co.*, 395 U.S. at 602. See, *e.g.*, *NLRB* v. *Star Color Plate Service, supra.* Conversely, *Peoples Gas System, Inc.* v. *NLRB,* 629 F.2d 35 (D.C. Cir. 1980), involved a bargaining obligation long after the certification year. There the court of appeals sustained the Board's decision that the employer had unlawfully withdrawn recognition from a long-certified union but went on to find a bargaining order unwarranted because, after the unlawful withdrawal, the employees had decisively rejected the union in a fair decertification election. *Id.* at 47, 50.

Finally, in *NLRB* v. *H.P. Hood, Inc.*, 496 F.2d 515, 520 (1st Cir. 1974), the court simply withheld for 60 days entry of an enforcement order, thereby giving the Board, which had indicated that it was willing to reconsider the appropriateness of a bargaining order due to passage of time, an opportunity to do so. Thus, none of these cases calls into question the decision here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

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